No. 02-311

FEB 18 2003

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN WIGGINS, *Petitioner,*

v.

SEWALL SMITH, Warden, *Respondent.*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ARIZONA, COLORADO, GEORGIA, ILLINOIS, INDIANA, LOUISIANA, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, UTAH, VIRGINIA, AND WASHINGTON IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Maryland Court of Appeals' ruling, denying petitioner's claim of ineffective assistance of counsel, was "contrary to" or an "unreasonable application of" this Court's "clearly established" Sixth Amendment jurisprudence.

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In the Supreme Court of the United States

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KEVIN WIGGINS, *Petitioner,*

v.

SEWALL SMITH, Warden, *Respondent.*

INTEREST OF AMICI

Amici States have a compelling obligation to protect the finality of judgments rendered in their criminal courts. The undoing of this finality in federal habeas corpus proceedings undermines public safety, deterrence of crime, retribution, and effective rehabilitation; and the passage of time increases the risk of unfairness and inaccuracy in any later re-trial of the criminal case. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress entrusted to the state courts the primary responsibility for ensuring that their criminal trials conform with constitutional norms. Overly intrusive habeas corpus review by the federal courts is disrespectful to the States and inconsistent with Congress' plan.

STATEMENT OF THE CASE

Petitioner Kevin Wiggins was convicted, in a trial before a judge, of the 1988 murder of an elderly woman, Florence Lacs, in Maryland. The conviction rested on circumstantial evidence. Petitioner, working temporarily at the apartment complex where she lived, was seen talking to Mrs. Lacs on a Thursday afternoon. He then lingered at the complex for no apparent reason after his release from work. By that evening, he was in possession of Mrs. Lacs' automobile and jewelry and was using her credit cards. Police found Mrs. Lacs' body, drowned in the bathtub in her ransacked apartment, on Saturday. The body was dressed in the clothing she had worn on Thursday, and the condition of the body was consistent with the theory that she might have been killed as early as Thursday. *Wiggins v. State*, 597 A.2d 1329, 1361-1365 (Md. 1991).

The penalty phase of the trial was tried to a jury. To obtain a death sentence under Maryland law, the prosecution at the penalty phase was required to prove, beyond a reasonable doubt, that petitioner personally had killed the victim. J.A. 363; see Md. Code Ann., art. 27, § 413. Defense counsel—having uncovered some evidence of physical and sexual abuse in petitioner's childhood and having obtained a psychiatric opinion about petitioner's mental health—asked the judge to "bifurcate" the sentencing trial so that the defense first could contest "principalship" separate from litigating the sentence-choice issues of aggravation and mitigation. Counsel explained that they were wary the jury otherwise might rely on evidence of petitioner's history as a reason to believe he personally had committed the murder. J.A. 34-42, 46, 485-486, 490-492, 501-506; see *id.* at 348-351. Ruling under Maryland law, the judge rejected counsels' motion to bifurcate. Counsel then presented a defense that eschewed evidence about the defendant's background and mental health

and instead concentrated primarily on contesting the persuasiveness of the state's proof of "principalship." J.A. 53-56, 70, 319-321, 396-397; see *id.* at 407-408. The jury returned a verdict of death.

On direct review, the Maryland Court of Appeals rejected petitioner's claim that the state's circumstantial evidence had been insufficient to establish petitioner's guilt for the murder. *Wiggins*, 597 A.2d 1329. Later, in state post-conviction proceedings, petitioner claimed that his lawyers at the sentencing hearing had rendered "ineffective assistance" under *Strickland v. Washington* by failing to conduct a more extensive "mitigation" investigation into petitioner's personal history and by relying on the "principalship" defense to the exclusion of evidence about petitioner's deprived background. *Wiggins v. State*, 724 A.2d 1, 15-18 (Md. 1999). But both the trial court and the Maryland Court of Appeals concluded that counsels' performance in this regard had comported with Sixth Amendment standards. *Id.* at 3, 15-18; App. to Cert. Pet. 132a-156a.

A federal habeas corpus judge later disagreed. He found the state's guilt-phase evidence insufficient to support petitioner's conviction for murder. And he further found that counsel had rendered "ineffective assistance" at the penalty trial in that they had failed to conduct a sufficient "mitigation" investigation so that their decision to instead present a "principalship" defense was uninformed. *Wiggins v. Corcoran*, 164 F.Supp.2d 538, 556-560 (D. Md. 2001).

The Fourth Circuit Court of Appeals reversed the district court's grant of habeas corpus relief. Applying the rule for habeas corpus review set out in 28 U.S.C. § 2254(d), the Fourth Circuit determined that the Maryland appellate court's adjudications—of the insufficient-evidence claim under this Court's precedent of *Jackson v. Virginia* and its adjudication of the ineffective-counsel claim under *Strickland*—were at

least "minimally consistent" with the law and the facts and therefore could not be condemned as either "contrary to" or an "unreasonable application of" federal law as "clearly established" by this Court's cases. *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002).

Petitioner sought a writ of certiorari on both the *Jackson* issue of evidentiary sufficiency and *Strickland* issue of effective counsel. This Court granted certiorari only on the ineffective-counsel claim.

SUMMARY OF ARGUMENT

Two fundamental rules of deferential judicial review—the rule of *Strickland v. Washington* governing direct appellate review of the effectiveness of defense counsel's performance in a criminal trial, and the res judicata rule of 28 U.S.C. § 2254(d) limiting the federal habeas corpus court's power to revisit claims adjudicated in state criminal proceedings—separately and in combination require denial of the writ of habeas corpus in this case. Petitioner's challenge to his lawyers' investigation and choice of defense strategy at the sentencing phase of his capital trial fails on the merits under *Strickland* because his lawyers undertook a reasonably sufficient investigation uncovering "mitigating" evidence in petitioner's background before making a hard strategic choice—one any reasonable lawyer might have made—to present instead a different defense that might have been undermined by the alleged "mitigation."

In any event, under Section 2254(d), petitioner's claim ultimately must fail in a federal habeas court for two further reasons. One, the Maryland courts indeed evaluated the evidence under this Court's *Strickland* rule, which does not ever require a perfect or complete "mitigation" investigation in a capital case, and which allows a lawyer to make a reasonable decision to forgo a particular investigation

anyway. As experience in the Ninth Circuit shows, the notion that such mitigation always must be investigated and presented leads to unrealistic and absurd results.

Two, the state courts' "application" of *Strickland* to the facts cannot be deemed "objectively unreasonable" in light of evidence that counsel made an actual strategic choice, and one that any reasonable lawyer might have made, to present a different potentially-meritorious defense. Further, counsel undertook some investigation into predictable areas of potential mitigation in the defendant's personal background, and federal courts may not re-weigh the evidence in reviewing the state-court's ruling for mere reasonableness.

1. In *Strickland v. Washington*, this Court adopted a deferential rule of judicial review for Sixth Amendment challenges to the strategic litigation choices that lawyers must make in defending the accused in criminal cases. Because "there are countless ways to provide effective assistance in any given case," the *Strickland* rule accords broad latitude to defense lawyers carrying out their difficult obligations, and it discourages both the "second-guessing" of counsel's performance and the "*proliferation* of ineffectiveness challenges" itself. *Strickland*, at 690 (emphasis added). In particular, *Strickland* approves "less than complete" investigations of the facts, in contrast to "thorough" ones, if reasonably justified in counsel's professional opinion. 466 U.S. at 690-691. *Strickland* goes no further than establishing that "counsel has a duty to make *reasonable investigations* or to make *a reasonable decision that makes particular investigations unnecessary*." *Id.* (emphasis added).

Although petitioner accuses the state court of directly flouting this Court's Sixth Amendment precedents, it is petitioner whose arguments conflict with *Strickland* and its progeny. Petitioner would require, contrary to *Strickland's* deferential rule of reasonableness, the adoption of rigid constitutional regulations that in effect would require defense

counsel to undertake, in every capital case and regardless of the circumstances, a perfect and complete investigation that uncovers all available potentially mitigating evidence in the defendant's personal background. Contrary to *Strickland*, petitioner would deny to counsel the exercise of professional judgment to abort such an investigation or forgo such evidence in favor of a different strategy that appears more promising or in order to better allocate limited resources in defending his client.

Through a series of Ninth Circuit opinions that depart from *Strickland*, amici States can report that they have seen the future of the rigid approach here urged on this Court by petitioner—and it doesn't work. On the unsound hypothesis that all mitigating evidence always must be unearthed for presentation to the sentencer, and with disregard for the practical expertise of working lawyers, the Ninth Circuit has erroneously condemned as incompetent dedicated defense attorneys whose continued participation in the criminal justice system is indispensable. For example, under the mechanical rules and hindsight judicial review endorsed by those opinions, and by arguments like petitioner's, lawyers have been deemed incompetent for failing to present mental-state opinion testimony developed in the years following the finality of the defendant's conviction, even though experts consulted by defense counsel prior to trial had offered no such opinions at the time. Attorneys have been condemned for failing to produce evidence of their client's personal experiences, even where their client would not cooperate in the enterprise, and even where such evidence threatened to undermine other lines of the penalty-phase defense. They have been castigated, in hindsight, for persisting in a penalty-phase defense consistent with the defense presented at the guilt-phase; and, conversely, they have been condemned for declining to adhere, at the penalty phase, to a line of defense that the jury rejected at the guilt phase. Petitioner's

arguments would perpetrate a similar injustice on defense counsel in this case.

2. Even if a federal habeas court reasonably might disagree with the result the Maryland courts reached in adjudicating petitioner's ineffective-counsel claim, a second fundamental rule—that of 28 U.S.C. § 2254(d), adopted as part of the AEDPA—still would bar relief in petitioner's case. In Section 2254(d), Congress profoundly reformed federal habeas corpus law by requiring another level of deferential review of a state-court's adjudication of any constitutional claims raised in a criminal case. In categorically precluding relief on such claims even where the state court's decision is wrong—provided that the state court did not directly flout or "unreasonably apply" this Court's "clearly established" precedents—Section 2254(d) ensures that state-court convictions are given effect to the extent possible under law.

Either one of these rules of deferential review, if applied alone, would severely diminish the possibility of federal relief on a claim such as petitioner's. But, where the state court recognizes and applies this Court's clearly established Sixth Amendment law, the synergistic effect of the *Strickland* and Section 2254(d) rules disallows federal habeas corpus relief on a state prisoner's ineffective-counsel claim except in the rarest of cases. The federal court's legitimate role under the modified res judicata rule of Section 2254(d) becomes, as the Fourth Circuit recognized, that of simply assuring that the state court's rejection of the claim under this Court's precedents was "minimally consistent" with the facts and the law. That inquiry is at its narrowest when the underlying claim itself requires the state court to review deferentially the performance of counsel. Any greater role poses a demonstrable risk that a grant of federal habeas corpus relief will be ill-founded, either upon improper second-guessing of counsel in violation of *Strickland*, or the federal court's mere

substitution of its own judgment for that of the state court in violation of Section 2254(d).

3. In this case, the Fourth Circuit accurately determined that the state court's adjudication of petitioner's *Strickland* claim was at least "minimally consistent" with the facts and the law. Evidence before the state court indicated that counsel had made a conscious, strategic choice—based upon their evaluation of the merits—to present a defense of "no principalship." That defense was at least potentially meritorious under the law and on the facts; and no one can plausibly claim that presentation of the petitioner's "social history" conclusively would have succeeded instead. Moreover, presentation of evidence of hardship or mental problems in petitioner's background conceivably might have undermined the force of that defense in the minds of a jury. In any event, counsel in fact undertook some inquiry—and here a substantial one—into mitigating evidence in petitioner's background and personal circumstances. In short, there was more than a minimal rational basis in the evidence for the state court's rejection of petitioner's challenge to his lawyers' performance. A grant of relief under the guise of "objective reasonableness" review necessarily would proceed from impermissible second-guessing and re-weighing of evidence in violation of Congress' plan.

ARGUMENT

THE STATE COURT'S RULING ON THE *STRICKLAND* CLAIM IS CONCLUSIVE UNDER 28 U.S.C. § 2254 BECAUSE THE RECORD CONTAINED EVIDENCE THAT COUNSEL HAD MADE A STRATEGIC DECISION TO PRESENT A POTENTIALLY-MERITORIOUS DEFENSE THAT LOGICALLY MIGHT HAVE BEEN IMPAIRED BY EVIDENCE OF PETITIONER'S BACKGROUND

The fundamental legal principles that control petitioner's case are contained in *Strickland v. Washington*, 466 U.S. 668 (1984), which set the standard for the Maryland courts' judicial review of the claim of ineffective counsel, and 28 U.S.C. § 2254(d), which sets the standard for later federal habeas corpus review of the state courts' ruling. The essential characteristic of each of these standards is deference, first to the defense lawyer and then to the state court. In a federal habeas corpus case involving a fact-specific ineffective-counsel claim, already rejected on its merits by the state courts, the combination of the standards leaves only the narrowest grounds for yet another round of review.

On the "performance" prong of the *Strickland* test, requiring "reasonable competence" under prevailing professional norms, 466 U.S. at 688, this Court must reject petitioner's extravagant claim that counsel in capital cases are, in effect, required to conduct a perfect investigation unearthing all available evidence about the defendant's personal background before making any strategic choice to present a different penalty defense instead. Nothing in this Court's cases supports, let alone "clearly establishes," such a rigid and unworkable rule in evaluating the performance of counsel. Because the Maryland courts in petitioner's state

case analyzed the evidence under this Court's *Strickland* rule, which does not impose on counsel the unrealistic duty described by petitioner, its ruling cannot be condemned as "contrary to" this Court's clear holdings.

Petitioner's related argument, that the Maryland Court of Appeals in any event applied the *Strickland* rule to the facts in an "objectively unreasonable" way, also must fail. Given evidence that counsel made a conscious and rational strategic choice to forgo mitigating evidence in petitioner's history—and, indeed, that they had done so after actually inquiring into areas of such mitigation—there is no room for any conclusion that the Maryland court's adjudication of the merits of petitioner's claim was an "unreasonable application of" this Court's Sixth Amendment law. To the contrary, this Court has validated similar, and arguably lesser, performances by capital defense counsel at sentencing. E.g., *Burger v. Kemp*, 483 U.S. 776 (1987); *Strickland*, 466 U.S. 668; see, e.g., *Darden v. Wainwright*, 477 U.S. 168, 184-186 (1986).

A. Neither *Strickland* nor Section 2254(d) allows relief on a claim that lawyers are incompetent simply because they did not completely investigate all mitigating evidence in a defendant's background, or because they chose an alternative defense that eschewed such mitigation at the sentencing hearing.

1. Petitioner argues that the Maryland Court of Appeals' rejection of his ineffective counsel claim was "contrary to" this Court's "clearly established" jurisprudence. (Pet. Br. 16, 20.) But the state court explicitly acknowledged that "the standard to be applied . . . is that enunciated in *Strickland v. Washington*." *Wiggins v. State*, 724 A.2d at 12. And, in ultimately rejecting petitioner's challenge under *Strickland's* "performance prong," the Maryland court again explained that petitioner's argument "runs afoul of the principle set forth in

Strickland." *Id.* at 17. For this reason, petitioner's argument must fail. *Early v. Packer*, 123 S.Ct. 362, 364-366, No. 01-1765 (Nov. 4, 2002)(per curiam).

2. Petitioner and various amicus briefs necessarily argue, whether explicitly or not, that this Court's "clearly established" Sixth Amendment jurisprudence requires defense counsel in every capital case to complete successfully an exhaustive investigation uncovering all available evidence of potentially-mitigating evidence in the defendant's personal background. (Pet. Br. 17 (character evidence "generally required"), 18 (courts may not defer to tactical choices if counsel unaware of available mitigation), 21-22 (constitutional penalty-phase standards require presentation evidence of defendant's character and record), 24 (lawyer required to collect as much information "as possible"), 26 (lawyer must "explore all avenues leading to the facts"), 27 (investigation should seek "all reasonably available mitigating evidence"), 29-32 (counsel in no position to make strategic choice if ignorant of mitigating evidence); ABA Br. 3-4, 13-21 (listing numerous elements of a "complete" investigation, including the hiring of experts).) If not clear enough from the text of these briefs, the inescapable logic of their arguments nevertheless leads directly to two untenable propositions. *First*: the defendant is entitled to a perfect investigation that unearths all available mitigating evidence. *Second*: if any such evidence remains undiscovered, the court must discredit as "uninformed" a strategic decision of defense counsel to forgo such mitigation in favor of a defense that appears, in light of counsel's professional expertise, more likely to succeed.

Petitioner suggests no principled method of distinguishing a complete and perfect investigative effort from a "reasonable" one. The radical scope of petitioner's argument appears especially stark in his apparent insistence that counsel may not be credited with an informed strategic

decision to forgo such mitigation evidence if there remained available any undiscovered evidence along those lines. (Pet. Br. 29-32.) The obvious import of petitioner's argument is that counsel may never stop investigating in any area that might provide evidence more promising than evidence already known to him.

In the view of amici States, it is imperative that this Court soundly reject any interpretation of *Strickland* that would lend support to either of those unrealistic and unworkable propositions. The threat that they would pose to *Strickland's* policies—of deferential review of counsel's performance for simple reasonableness and the avoidance of a proliferation of bitterly intrusive hindsight challenges to the performance of lawyers whose energetic participation in the defending capital cases is indispensable—is hardly an imaginary one. Despite *Strickland's* quite different aim, 466 U.S. at 689-690, challenges to the competence of counsel have indeed "proliferated," and it is now all but inevitable that a habeas corpus petition in a capital case will contain multiple attacks on trial counsel's performance. See Price Waterhouse Cooper, COST OF PRIVATE PANEL REPRESENTATION IN FEDERAL CAPITAL HABEAS CORPUS CASES FROM 1992 TO 1998, p. xvii (80 per cent of cases). Given the money made available in state courts and in lower federal courts, *id.*, at pp. vi-viii, V40-43, V70-76, VIII-119 (average fees of $130,000 to prepare federal capital petition)[1/], and the often glacial pace of federal capital habeas corpus in some Circuits, the petitioner will always be able to produce previously undiscovered evidence of alleged mitigating circumstances.

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1. In a recent proceeding in the Central District of California, the district judge stated that the average costs for petitioner's counsel in a capital habeas corpus case in the judge's court ranged from 1.5 to 2 million dollars, and that the cases spanned eight to ten years. *Pinholster v. Calderon*, No. CV-95-6240-GLT, Rep. Tr. 30 (Sept. 11, 2002).

See *Karis v. Calderon*, 283 F.3d 1117, 1142 (9th Cir. 2002) (diss. op.).

3. In this atmosphere, it is ominous indeed that one federal circuit has issued opinions flatly stating that "*all* relevant mitigation information *must be unearthed for consideration* at the capital sentencing phase." *Caro v. Calderon*, 280 F.3d 1247, 1257 (9th Cir.) (emphasis added), cert. denied, 122 S.Ct. 2645 (2002); accord, *Turner v. Calderon*, 281 F.3d 851, 891 (9th Cir. 2002). Under such a rule, as experience in that circuit portends, an attorney will be deemed incompetent for failing to present expert mental-impairment testimony even if two experts examine the defendant before trial and find no impairments and the defendant refuses to cooperate in any further examinations. *Douglas v. Woodford*, 316 F.3d 1079, 1085-1086 (9th Cir. 2003). Similarly, an attorney will be held incompetent for failing to investigate the defendant's mental health, even if four experts examine the defendant and none indicates that he was suffering from insanity or diminished capacity. *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir.), cert. denied, 527 U.S. 1049 (1999). The same fate will befall the lawyer who forgoes investigating other lines of defense after his client claims alibi. *Phillips v. Woodford*, 267 F.3d 966, 972-980 (9th Cir. 2001). The same will await the lawyer who, to encourage trust, refrains from investigating mitigation in the defendant's background after his client threatens to sabotage the defense to prevent questioning of his parents. *Silva v. Woodford*, 279 F.3d 825, 837-840 (9th Cir.), cert. denied, 123 S.Ct. 342 (2002); see *Douglas*, at 1086 (counsel should have investigated childhood even though petitioner would not reveal names of witnesses); *Karis*, 283 F.3d at 1135, 1140-1141; *id.* at 1142 (diss. op.) (counsel must present evidence of abusive childhood).

Petitioner's proffered rule unreasonably would condemn the lawyer who presents guilt-phase testimony from a psychiatrist about the effects of PCP on the defendant's mens rea but then, after the jury finds the defendant nevertheless premeditated and deliberated the specific intent to kill, "fails" to produce the same psychiatrist for further penalty-phase testimony about the drug's effect on the defendant's ability to think at the time of the crime. *Jackson v. Calderon*, 211 F.3d 1148, 1163 (9th Cir. 2000), cert. denied, 531 U.S. 1072 (2001); cf. *Wade v. Calderon*, 29 F.3d 1312, 1324 (9th Cir. 1994), *id.* at 1324 (conc. and diss. op.) (criticizing counsel for persisting with a penalty-phase line of defense that had proved unsuccessful at the guilt phase). It would tar as incompetent the lawyer who presents mitigating testimony about the defendant's good qualities from an apparently kindly mother who might engender jury sympathy, and would require counsel instead to undermine those portrayals with evidence that the defendant's misbehavior had repeatedly prompted the mother to discipline him roughly. *Jackson*, at 1164 (maj. op.), 1167 (diss. op.); see *Rios v. Rocha*, 299 F.3d 796, 805-807 (9th Cir. 2002) (counsel held incompetent for presenting mental-state rather than misidentification defense after reviewing police report, speaking to an eyewitness, and reviewing a psychological report about the defendant). And it would do the same to the lawyer who fails to identify "all" evidence his medical consultants might adjudge "relevant" to their expert diagnosis—even though a lawyer properly hires medical consultants precisely for their expertise in making such judgments themselves. *Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997), cert. denied, 523 U.S. 1145 (1998); see *Lord v. Wood*, 184 F.3d 1083, 1095 (9th Cir.) (faulting counsel for not "personally" interviewing witnesses), cert. denied, 528 U.S. 1198 (2000); see also *Gentry v. Roe*, 300 F.3d 1007, 1013-1014 (9th Cir. 2002) (deeming components of closing argument ineffective).

Although this Court denied certiorari on various issues presented in many of these cases, together they now have reached a stage of critical mass on the *Strickland* question. As recently recognized by the Ninth Circuit's Judge Kleinfeld, there is

> a developing body of circuit law substituting our judgment on defense tactics and presentation for the judgment of defense counsel and of state courts. . . . The last thing criminal defendants and the public need is a Ninth Circuit "form book" of approved arguments and strategies, yet that's what we're giving them.

Gentry v. Roe, ___ F.3d ___, 2003 WL 192085, No. 00-55691 (9th Cir. Jan. 28, 2003) (op. dissenting from denial of en banc review). Plainly, amici States are hardly exaggerating, or attacking a straw man, in alerting this Court to the risk of adopting petitioner's extreme theory of "reasonable competence."

4. Nothing in *Strickland* supports petitioner's extravagant interpretation of counsel's duties. This Court's cases decline to impose "mechanical rules" on lawyers, *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000); *Strickland*, 466 U.S. at 688-689, 696; they recognize instead that "there are countless ways to provide effective assistance in any given case," *Strickland*, at 688. Petitioner's and some amici's many citations to norms of performance promulgated by academics, bar associations, and members of the defense bar do not support the use they seek to make of them. Petitioner selectively quotes from *Strickland*, mentioning this Court's acknowledgment that such norms "are guides to determining what is reasonable." (Pet. Br. 26.) He leaves out *Strickland's* immediate qualification: ". . . but they are only guides." 466 U.S. at 688. As *Strickland* further explained, "the existence of detailed guidelines for representation could distract counsel

from the overriding mission of vigorous advocacy of the defendant's cause." *Id.* *Strickland* nowhere guarantees the "best" legal representation, or even aims to improve the quality of lawyering as bar-association norms obviously are intended to do. *Id.* at 680. Instead, *Strickland* clearly establishes that,

> strategic choices made after thorough investigation of law and facts relevant to plausible outcomes are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make *reasonable investigations or* to make *a reasonable decision that makes particular investigations unnecessary.*

466 U.S. at 691 (emphasis added). Thus, in *Strickland*, this Court approved defense counsel's reasonable "surmise," based on conversations with the defendant and the defendant's mother, that it likely would not be helpful to seek a psychiatric opinion or evidence from other witnesses and that the defense instead should rely, at the capital sentencing hearing, simply on the defendant's brief statement to the judge during an earlier guilty-plea colloquy.

Nor does the Sixth Amendment require, or even prefer, the actual presentation of evidence of the defendant's personal history. Petitioner strongly implies that it does, for he argues that, even if his lawyer's investigation of personal-background mitigation were complete, counsel in the case at bar still could not reasonably decide to forgo it in favor of the "principalship"-based defense. (Pet. Br. 37 et seq.) To say the law demands a full "mitigation" investigation even where a different and complete defense to death-eligibility is available, however, is to incorrectly assume that courts later

on will be in position to confidently judge that the lawyer should have chosen the one line of defense over the other. Such judicial review could only occur with hindsight, or by adherence to a rule that there is only "one way" to defend an accused, and that is what *Strickland* prohibits. 466 U.S. at 669. Sixth Amendment principles do not support any requirement or preference for the presentation of personal-background evidence. Thus, in *Burger v. Kemp*, 483 U.S. 776, this Court was accepted counsel's judgment that evidence of an unstable childhood, in which the defendant saw one parent beaten and learned to use drugs from the other, would not help minimize the possibility of a death verdict.

5. Petitioner says that, in *Williams v. Taylor*, 529 U.S. 362 (2000), this Court "clearly established" rules requiring full investigation and/or presentation of mitigating personal- or social-history evidence. (Pet. Br. 20-21 et seq.) But, even if this Court had done so, it would be of no use to petitioner. *Williams* was decided well after the Maryland court adjudicated petitioner's ineffective-counsel claim. It therefore cannot logically be maintained that the state court's ruling "was," under Section 2254(d), contrary to a rule that had not even been announced, let alone "clearly established," at the time.

More important, *Williams* did not hold, or "clearly establish," that the Constitution compels the extensive mechanical investigation regulations proffered by petitioner and some of the amicus briefs. In *Williams*, counsel had completely failed to investigate any potential mitigation in the defendant's personal history. And—although amici believe that the implication requires further examination, see pp. 24-25, *post*—the *Williams* Court's judgment about the defense investigation seemed to be affected significantly by the fact that counsel largely had failed even to make conscious strategic choices, on the relative merits of the potential

available defenses, to forgo potential evidence of his client's abusive childhood in favor of a different defense strategy. 529 U.S. at 395. Moreover, the Virginia Supreme Court simply assumed that counsel's efforts failed *Strickland's* "performance prong"; and, in the appeal in this Court, the State "barely disputed" that assumption. 529 U.S. at 371, 395. It is true that *Williams* indeed stated that counsel in that case had failed in his obligation to conduct a "thorough" investigation. *Id.* at 395. But, in the context of such extreme facts and the diminished level of adversarial contest, *Williams* should not be interpreted as changing sub silentio the limited, clearly-established *Strickland* rule that "counsel has a duty to make *reasonable* investigations *or to make a reasonable decision that makes particular investigations unnecessary.*" 466 U.S. at 391 (emphasis added).

Strickland and its progeny do not support petitioner's extravagant interpretation of counsel's duty and the inevitable risk such an interpretation poses. Despite petitioner's argument to the contrary, then, the Maryland courts' rejection of the ineffective-counsel claim in this case was not "contrary to" *Strickland* or this Court's clearly-established law.

B. *Strickland* and Section 2254(d) combine to provide maximum deference, in federal habeas corpus proceeding, to a state court's application of clearly established Sixth Amendment law to the unique facts surrounding defense counsel's investigation and strategic choices in a criminal case.

Petitioner further argues that, even if not strictly "contrary to" the extreme and rigid rules he incorrectly discerns in the *Strickland* line of cases, the Maryland courts' rejection of his ineffective-counsel claim nevertheless represented an "objectively unreasonable application" of the general *Strickland* standard requiring reasonably competent

performance. (Pet. Br. 16, 28.) But federal habeas corpus review in this area—requiring deferential reasonableness review of a state court decision itself predicated upon deferential reasonableness review of counsel's performance in the context of a unique array of facts—is extremely narrow and cannot support a grant of relief in this case.

1. Under *Strickland*, the defendant bears the burden of overcoming a "strong presumption" that, under the circumstances, "the challenged action '*might* be considered sound trial strategy.'" 466 U.S. at 689 (emphasis added). The state court must determine whether "the identified acts or omissions were *outside the wide range* of professionally competent assistance." *Id.* (emphasis added). Counsel may not be condemned for a "decision about which competent lawyers *might* disagree." *Bell v. Cone*, 122 S.Ct. 1843, 1854 (2002) (emphasis added). Because "there are countless ways to provide effective assistance in any given case," *Strickland* accords the broadest latitude to defense lawyers in meeting their difficult obligations, and aims to discourage both hindsight "second-guessing" of counsel's performance and the "proliferation" of ineffectiveness challenges. *Strickland*, at 689-690.

2. Section 2254(d), also a deferential standard, prohibits federal habeas corpus relief on claims already "adjudicated on the merits" in state court. It provides only narrow exceptions where the state court decides the case "contrary to," i.e., directly opposed to, a binding precedent of this Court, or where the state court otherwise applies a clearly established general rule of law to the individual facts of a case and reaches a result that is not just incorrect but also "objectively unreasonable." *Williams v. Taylor*, 529 U.S. at 404-410. Section 2254(d) thus serves as another layer insulating state-court judgments; it "ensure[s] that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 122 S.Ct. at 1849.

3. Real effect, obviously, must be given both to *Strickland* and to Section 2254(d) in this case. When promulgating the *Strickland* standard in 1984, this Court determined that, as a matter of habeas corpus jurisprudence, "no special standards ought to apply to ineffectiveness claims made in habeas proceedings." 466 U.S. at 697-698. But Congress changed that in 1996. In the AEDPA, it amended the basic habeas corpus statute, 28 U.S.C. § 2254, to provide a special deferential standard for all claims—ineffectiveness claims among them—adjudicated on the merits in the state courts. Now, the multi-level deferential standards contained in *Strickland* and in Section 2254(d) operate together in a case such as petitioner's. Not only must a state court review counsel's performance deferentially under *Strickland*, but the further deferential standard of Section 2254(d) "leaves *primary responsibility* with the state courts for these judgments." *Woodford v. Visciotti*, 123 S.Ct. 357, 361, No. 02-137 (Nov. 4, 2002) (per curiam).

Absent an affirmative showing that the state court did not conscientiously apply the "correct" deferential *Strickland* standard to the myriad facts in an individual case, the combination of *Strickland* and the deferential Section 2254(d) standards logically leaves only the narrowest ground upon which a federal habeas court may conclude that the state court's ruling was not merely wrong but "objectively unreasonable." In the case at bar, the Fourth Circuit's analysis reflects that, in this respect, federal habeas corpus review for "objective unreasonableness" in a state court's actual application of the deferential, fact-specific *Strickland* inquiry resembles the minimal judicial scrutiny of the sufficiency of evidence to support a guilty verdict prescribed by *Jackson v. Virginia*, 443 U.S. 307 (1979). On direct appeal, review simply tests whether any rational juror could have found the defendant guilty under the operative legal standard and on the evidence presented. *Id.* Appellate courts

rarely reject, on sufficiency grounds, jury fact-findings and jury determinations of trial questions on issues such as the elements of the crime and the reasonableness of a defendant's belief in the need for self-defense. In further habeas corpus proceedings under Section 2254(d), review logically should be even more deferential. See *Gomez v. Azevedo*, 106 F.3d 192, 197 (7th Cir. 1997), vacated and remanded, *Gomez v. Teller*, 522 U.S. 801 (1997); compare *Jackson* (post-*Winship* rule of review) with *Thompson v. Louisville*, 362 U.S. 199 (1960) (pre-*Winship* rule requiring only "some" evidence). Section 2254(d) review of a *Strickland* claim should involve a similar kind of deference with similar kinds of results.

Federal habeas courts under Section 2254(d) should limit their review of a *Strickland* claim to the question of whether the record provided even the most minimal support for the state court's ruling. In limiting their review, they also must take care to focus separately upon the question of whether the record provided minimal conceivable support for the challenged ruling, rather than on the question of whether counsel's performance violated *Strickland*. They may not slap an "objectively unreasonable" label on the state court's ruling whenever they disagree with it. Nor should they allow it to appear that they have done so.

The problem of courts paying mere "lip service" to Section 2254(d) is real enough. See *Gentry v. Roe*, *supra*, 300 F.3d at 1014 (diss. op.); *id.*, 2003 WL 192085 (diss. op.). As this Court has made clear, Section 2254(d) allows habeas corpus relief when the state-court adjudication is "objectively unreasonable"—not where the federal court simply thinks it is "wrong." *Woodford v. Visciotti*, 123 S.Ct. 357, 361 (2002); *Bell v. Cone*, 122 S.Ct. at 1852. But, in purporting to apply Section 2254(d), federal courts persist in granting relief based upon the strength of their own belief that the state court erred, without first inquiring whether an objective basis nevertheless supported the state court's ruling. See *Van Tran v. Lindsey*,

212 F.3d 1143, 1153 (9th Cir.), cert. denied, 531 U.S. 944 (2000). And, certainly, some courts reject state court adjudications under Section 2254(d) without any attempt to explain why the state court ruling was objectively unreasonable under this Court's precedents and not merely "wrong." E.g., *Bradley v. Duncan*, 315 F.3d 1091, 1100-1101 (9th Cir. 2002); *Gentry v. Roe*, 300 F.3d at 1013-1014. Absent clear methodological restraints on federal court review, the current state of affairs—one in which intrusive federal challenges on ineffective-counsel claims occur in virtually *every* capital case and many non-capital cases, with oscillating decisions upholding and denying relief common at each new stage of judicial review—will remain a testament to federal-court failures in carrying out Congress' goal in Section 2254(d) and this Court's goals in *Strickland*.

Petitioner's challenge to the state court's "application" of clearly established law to the specific facts of his case would perpetuate such failures. Barely even paying "lip service" to the habeas corpus statute, his brief relegates to the status of mere afterthought the dramatic change in federal habeas corpus review wrought by Congress' enactment of Section 2254(d). In petitioner's telling of it, the conclusion that the state court's ruling was "objectively unreasonable" under this Court's ineffective-counsel precedents follows automatically from his argument that the state court ruling was "incorrect." No further explanation is offered.

Here, in contrast, the Fourth Circuit asked whether, for Section 2254(d) purposes, the Maryland court's adjudication of petitioner's twin sufficiency-of-evidence and ineffective-counsel claims was at least "minimally consistent" with the law and the facts. See *Wiggins*, 288 F.3d at 637. On such fact-specific claims, which themselves require initial judicial deference to the decision-maker, "minimal consistency" at most requires merely some evidence in the record that

rationally might provide any support for the state court's determination of counsel's reasonableness.

C. Because counsel presented a potentially-meritorious complete defense of "principalship," and in any event because there was evidence that counsel conducted some investigation into mitigation beforehand, federal habeas corpus relief would amount to mere re-weighing of the evidence and second-guessing of the state court in violation of Section 2254(d).

Given the evidentiary record in the state court, and the state court's application of the correct *Strickland* standard to that evidence, there is no room for federal habeas corpus relief under Section 2254(d).

1. Here, defense counsel presented a "principalship" defense that did not depend upon social- or personal-history evidence. That defense was potentially meritorious: the prosecution was required to prove principalship beyond a reasonable doubt, petitioner's lawyers at many stages of the state and federal proceedings have disputed the legal sufficiency of the prosecution's proof, one federal judge concluded that the evidence had been insufficient, and counsel pointed to fingerprint evidence as suggesting that other culprits had been in the victim's apartment. Indeed, the "principalship" defense predictably might have caused some jurors to doubt that petitioner had been involved in the murder even as an accomplice. S. Garvey, "Aggravation and Mitigation in Capital Cases: What Do Jurors Think?" 98 COL. L. REV. 1538, 1563 (Oct. 1998) (survey reporting that "[r]esidual doubt over the defendant's guilt is the most powerful 'mitigating' fact"); see *Traver v. Hooper*, 169 F.3d 710, 715 (11th Cir. 1999) (collecting authorities recognizing cogency of lingering doubt); compare *Julius v. Johnson*, 840 F.2d 1533, 1542 (11th Cir. 1988) (rejecting defendant's

challenge to effectiveness of lingering-doubt argument) with *Hamilton v. Vasquez*, 17 F.3d 1149, 1164 (9th Cir. 1994) (defendant challenges *failure* to argue lingering doubt). Certainly, a reasonable lawyer might have made the same choice made by petitioner's counsel.

Presentation of the details of "mitigating" hardships and/or mental-health opinion conceivably might have impaired the "principalship" defense by providing the jury with reasons why petitioner might have developed into the kind of man who personally could commit a homicide—or by posing the risk that the jurors would conclude, logically or not, that the defense was dishonestly or inconsistently seeking both to deny and to explain the killing. See W. White, "Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care," 1993 U. ILL. L. REV. 323, 356 (emphasizing need for consistent guilt- and penalty-phase defenses). Conversely, no one plausibly could argue that evidence of personal-background mitigation, either that known to counsel or the further information inevitably developed over time in the post-conviction investigations, conclusively would have succeeded while a "principalship" defense could not.

In amici's view, the federal court under Section 2254(d) need look no further into the record to discern that the state court's adjudication of petitioner's claim under the proper *Strickland* standard was not "objectively unreasonable." This Court's clearly-established law, as explained above, allows counsel "to make reasonable investigations *or to make a reasonable decision that makes particular investigations unnecessary.*" *Strickland*, 466 U.S. at 691 (emphasis added). Under Section 2254(d), Congress left to the Maryland courts the primary and initial obligation to faithfully apply this Court's clearly established law to the particular facts of petitioner's case. *Visciotti*, at 361. Given the potential merit of the "principalship" defense and the conceivable risk

attendant to omitting or diluting it in favor of presenting background mitigation evidence, there was a rational basis for the state court to adhere to *Strickland's* presumption that counsel's challenged conduct "*might* be considered sound trial strategy" and was not shown to be "outside the range of professionally competent assistance." See 466 U.S. at 689-690 (emphasis added).

2. Of course, as Maryland shows in its brief, there was much stronger evidence supporting not only the objective reasonableness but the correctness of the decision rendered in the state courts. Petitioner's defense lawyers had conducted a substantial, indeed ample, investigation into predictable areas of potential mitigation in the defendant's personal background; and they uncovered evidence that petitioner might have suffered hardships: painful parental discipline, foster home placement, sexual victimization, and expert opinion as to some level of petitioner's mental-health problems. In addition, counsel in fact exercised reasoned professional judgment in choosing to concentrate on "principalship" rather than risk impairing that complete defense with evidence of petitioner's personal background. information. Indeed, they sought to modify the trial procedures to allow sequential presentation of background evidence if the jury first actually found "principalship."

3. Although the "objective reasonableness" of the state court's rejection of the *Strickland* claim is clearly enhanced by evidence of a substantial investigation and a subjective strategic choice on the relative merits of different penalty-phase lines of defense, such evidence is not invariably necessary in order to validate counsel's performance, at least not in the unique context of a combined *Strickland*-Section 2254(d) habeas corpus case. The state court here might have concluded, that under the then-"prevailing professional norm" and local circumstances in Baltimore County in1988, that a reasonable lawyer might have chosen to pursue the complete

"principalship" defense over an inherently uncertain defense based upon details of the defendant's background regardless of what details ever might emerge even in a "complete" social-history investigation. Resolution of those fact-specific questions, again, is left primarily to the state courts, not the federal habeas corpus courts, under *Strickland* and Section 2254(d). *Bell*, at 361.

Similarly, although review of the precise subjective thought process of trial counsel might well prove helpful to a court seeking to identify possible justifications for the challenged performance and in providing an extra measure of assurance in the accuracy of the court's judgment in close and doubtful cases, such proof is not always needed and should not be misused as a means of "grading" counsel's work. *Strickland* presumes that counsel's decisions are reasonably justified by tactics and strategy; and it imposes an "objective" standard of reasonableness under "prevailing professional norms" to determine whether the challenged conduct was "outside the range of professionally competent assistance." 466 U.S. at 688, 690. Mere incantation of the words "tactics" and "strategy" will not save a manifestly unreasonable performance. But neither should actual presentation of a defense obviously within the range of reasonable performance be condemned simply because of perceived inadequacy in the nature or quality of the lawyer's subjective thought processes. Amici States doubt that it would further the goals of the Sixth Amendment, as enunciated in *Strickland,* to invalidate a conviction because defense counsel gave insufficient thought to the matter before fully presenting a defense that a reasonable lawyer would have presented anyway.

Here, for example, the district judge indicated that counsels' decision must be rejected as ill-informed, regardless of whether a reasonable lawyer in all the circumstances might have reached the same decision and chosen the same line of defense anyway. *Wiggins v. Corcoran*, 164 F.Supp. at 560;

see *Hendricks v. Vasquez*, 974 F.2d 1099, 1109 (9th Cir. 1992) (ordering evidentiary hearing to ascertain counsel's actual reasons); cf. *Mak v. Blodgett*, 970 F.2d 614, 618 (9th Cir. 1992); *Hall v. Luebbers*, 296 F.3d 685, 697 (8th Cir. 2002). The inquiry, instead, should be an objective one, focusing on whether a reasonable lawyer under all the circumstances could have presented the same case as the challenged lawyer ultimately did. *Bell v. Cone*, 122 S.Ct. at 1853 (question is whether counsel made a decision "about which competent lawyers might disagree"); *Strickland*, at 690 (question is whether, "in light of all the circumstances," the challenged conduct was "outside the wide range of professionally competent assistance"); *Crawford v. Head,* 311 F.3d 1287, 1288 (11th Cir. 2002); see *Wiggins v. Corcoran*, 288 F.3d at 642.

4. Insofar as petitioner's argument rests on the extent of the actual mitigation investigation undertaken by counsel, and continued re-weighing of whether it rose to the level of a "reasonable" investigation under *Strickland*, it illustrates precisely what Section 2254(d) review should *not* be. Again, Congress' plan leaves such decisions to the state courts except in cases of the most obvious and egregious error. Given an actual inquiry by counsel and the unearthing of some evidence of a the defendant's background and mental condition, and one of more rounds of state-court *Strickland* review, relief in remote federal proceedings would inherently involve mere re-weighing of the evidence. Little is gained in terms of accuracy—and much is lost in terms of finality and fidelity to Congress' plan in Section 2254(d)—to have unending and oscillating determinations of "reasonableness" based on myriad sets of facts by a succession of judges years after the state courts faithfully applied the proper standard to the evidence in the first place.

5. There was—at the least—some rational evidentiary support for the state court, in applying the deference-to-

counsel *Strickland* rule, to conclude that counsel's decision might be considered to be within the range of professional competence under all the circumstances. Because the state court did not decline to apply the correct *Strickland* rule, and because there was at least some evidence rationally supporting the state court's adjudication under that rule, Section 2254(d) precludes federal habeas corpus relief on petitioner's ineffective-counsel claim.

CONCLUSION

For these reasons, the judgment of the Fourth Circuit should be affirmed.

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